

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

6 MART VAN DINE,)
7 Plaintiff,) No. 03:10-cv-00712-HU
8 vs.)
9 MICHAEL J. ASTRUE,) **FINDINGS AND RECOMMENDATION**
Commissioner of Social Security,) **ON MOTION FOR EAJA FEES**
10 Defendant.)

13 Merrill Schneider
P.O. Box 14490
14 Portland, OR 97293

15 Attorney for Plaintiff

17 S. Amanda Marshall
United States Attorney
18 Adrian L. Brown
Assistant United States Attorney
19 1000 S.W. Third Avenue, Suite 600
Portland, OR 97204-2904

21 Franco L. Bacia
22 Special Assistant United States Attorney
23 Social Security Administration
Office of the General Counsel
701 Fifth Avenue, Suite 2900 M/S 221A
Seattle, WA 98104-7075

24 Attorneys for Defendant

1 HUBEL, United States Magistrate Judge:

2 The plaintiff Mart Van Dine brought this action for judicial
3 review of the Commissioner's decision to deny his applications for
4 disability insurance benefits under Title II of the Social Security
5 Act, 42 U.S.C. § 1381 *et seq.*, and Supplemental Security Income
6 under Title XVI of the Act. In Findings and Recommendation entered
7 February 27, 2012, the undersigned recommended that the Commis-
8 sioner's decision be reversed, and the case be remanded for further
9 proceedings. Dkt. #25. Neither party filed objections, and on
10 March 29, 2012, Judge Marco A. Hernandez accepted my recommendation
11 and entered judgment for Van Dine. Dkt. #27 & 28.

12 The plaintiff now moves for an award of attorney's fees under
13 the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA), in the
14 amount of \$6,625.99. Dkt. #29 & 31. The parties have stipulated
15 to this amount as a compromise settlement. Dkt. #29. For the
16 reasons set forth below, I recommend the motion be granted.

17 EAJA requires an award of attorney's fees to a prevailing
18 plaintiff in a Social Security appeal, "unless the court finds that
19 the position of the United States was substantially justified or
20 that special circumstances make an award unjust." 28 U.S.C.
21 § 2412(d). In the present case, based on my previous finding that
22 the Administrative Law Judge erred in his evaluation of the
23 evidence, I conclude that the defendant's position was not
24 substantially justified, and thus an award of EAJA fees is
25 appropriate.

26 Determining that a plaintiff is a "prevailing party" for
27 purposes of an entitlement to EAJA fees is only the first step in
28 considering a motion for EAJA fees. "It remains for the district

1 court to determine what fee is 'reasonable.'" *Hensley v.*
 2 *Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d
 3 40 (1983). The *Hensley* court observed that "[t]he most useful
 4 starting point for determining the amount of a reasonable fee is
 5 the number of hours reasonably expended on the litigation
 6 multiplied by a reasonable hourly rate," *id.*, which calculation
 7 results in a "lodestar." *Webb v. Ada County, Idaho*, 195 F.3d 524,
 8 527 (9th Cir. 1999) (citing *McGrath v. County of Nevada*, 67 F.3d
 9 248, 252 (9th Cir. 1995)). The lodestar may be adjusted to reflect
 10 the results obtained in the case. *Id.* (citing *Schwarz v. Sec'y of*
 11 *Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995)). The
 12 district court enjoys "considerable discretion . . . in determining
 13 what attorney's fee is reasonable." *Id.*

14 The court first will look at "the number of hours reasonably
 15 expended on the litigation." *Hensley, supra*. The time records
 16 submitted with the plaintiff's motion indicate the plaintiff's
 17 attorney expended 37 hours in this case (.80 hours in 2010, 35.7
 18 hours in 2011, and .50 hours in 2012). Preliminarily, the court
 19 notes that an expenditure of 37 hours falls within the twenty-to-
 20 forty-hour range Judge Michael W. Mosman found to be a "reasonable
 21 amount of time to spend on a social security case that does not
 22 present particular difficulty." *Harden v. Comm'r*, 497 F. Supp. 2d
 23 1214, 1215 (D. Or. 2007) (noting "some consensus among the district
 24 courts" on this point; citing cases). Judge Mosman agreed that
 25 "[a]bsent unusual circumstances or complexity, . . . this range
 26 provides an accurate framework for measuring whether the amount of
 27 time counsel spent is reasonable." *Id.*

28

1 In the present case, the administrative record was 669 pages
2 long. The plaintiff's opening brief was twenty-one pages long, and
3 raised four issues requiring a detailed analysis of the ALJ's
4 treatment of the medical evidence in the case, the weight given to
5 the opinions of Van Dine's treating sources, and the ALJ's
6 credibility determination, as well as discussion of the applicable
7 law. The Commissioner responded with an eighteen-page brief, and
8 Van Dine filed a twelve-page reply. The complexity of the issues
9 and analysis of the evidence led to a 104-page opinion by the
10 undersigned, which is one of the longest opinions I have ever filed
11 in a Social Security case, due in large part to a complicated
12 medical history poorly analyzed by the ALJ. Counsel's time records
13 indicate the time he expended on the plaintiff's behalf in this
14 case was reasonable. None of the entries represents clerical or
15 secretarial tasks not payable under EAJA. *See, e.g., Gough v.*
16 *Apfel*, 133 F. Supp. 2d 878, 881 (W.D. Va. 2001) (noting that
17 "[p]urely clerical activities, regardless of who performs them, are
18 considered overhead and are not compensable as EAJA attorney
19 fees"). I therefore conclude that the total attorney time of 37
20 hours is reasonable under the circumstances.

21 In considering the applicable hourly rate, the statute itself
22 sets a \$125 per hour ceiling¹ "unless the court determines that an
23 increase in the cost of living . . . justifies a higher fee." 28
24 U.S.C. § 2412(d)(2)(A). To adjust for the cost of living, the
25 Ninth Circuit applies the national Consumer Price Index for All
26

27 ¹Congress raised the rate for EAJA fees from \$75 to \$125 per
28 hour in 1996. The CPI-U index, all items, not seasonally adjusted
for 1996, was 155.7.

1 Urban Consumers (the "CPI-U"), not seasonally adjusted, and
 2 applying the "all items" index. *Jones v. Espy*, 10 F.3d 690, 692-93
 3 (9th Cir. 1993). The cost-of-living increase is "calculated by
 4 multiplying the \$125 statutory maximum hourly rate by the . . .
 5 CPI-U for the years in which the attorney's work was performed and
 6 dividing by the CPI-U figure for March 1996 (155.7), the effective
 7 date of the statutory maximum hourly rate." *Nadarajah v. Holder*,
 8 569 F.3d 906, 918 (9th Cir. 2009) (citing *Thangaraja v. Gonzales*,
 9 428 F.3d 870, 876-77 (9th Cir. 2005)).

10 The EAJA-adjusted hourly rate for 2010 is \$175.06²; for 2011
 11 is \$180.59³; and for 2012 is \$184.95.⁴ Multiplying counsel's hours
 12 for the respective years results in attorney fees of \$140.05 for
 13 2010 (.80 hours x \$175.06); \$6,447.06 for 2011 (35.7 hours x
 14 \$180.59); and \$92.48 for 2012 (.50 x \$184.95); for a total of
 15 \$6,679.59 for all three years. This amount is \$53.60 more than the
 16 \$6,625.99 to which the parties have stipulated.

17 Accordingly, I recommend that the plaintiff's motion for EAJA
 18 fees in the amount of \$6,625.99 (Dkt. #29) be granted, and the
 19 plaintiff be awarded attorney's fees in that amount.

20

21 ***SCHEDULING ORDER***

22 These Findings and Recommendation will be referred to a
 23 district judge. Objections, if any, are due **October 8, 2012**. If no
 24

25 ²\$125 x (2010 annual index of 218.056/155.7) = \$175.06.
 26

27 ³\$125 x (2011 annual index of 224.939/155.7) = \$180.59.
 28

⁴\$125 x (2012 index for August, the most recently-available
 month, of 230.379/155.7) = \$184.95.

1 objections are filed, then the Findings and Recommendation will go
2 under advisement on that date. If objections are filed, then a
3 response is due by **October 25, 2012**. When the response is due or
4 filed, whichever date is earlier, the Findings and Recommendation
5 will go under advisement.

6 IT IS SO ORDERED.

7 Dated this 19th day of September, 2012.

8 /s/ Dennis J. Hubel

9
10

Dennis James Hubel
United States Magistrate Judge

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28